STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON SCOTT DRURY,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 241803
Oakland Circuit Court
LC No. 2001-179448-FH

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (sexual contact accomplished by force or coercion), and we affirm.

I. Facts and Procedural History

Defendant and his two victims were classmates at North Farmington High School. In April 2001, in a chemistry laboratory, defendant approached L.J. from behind and placed both of his hands on her inner, upper thighs, and rubbed inward and down between her legs. L.J. pushed defendant away but, approximately two weeks later, defendant again approached L.J. from behind, grabbed her buttocks with both hands, and squeezed. L.J. instructed defendant to stop and nudged him away from her. On May 18, 2001, defendant asked L.J. to work with him on a chemistry assignment. When L.J. walked to defendant's chair, defendant grabbed her by the legs, sat her down in another chair, and poked at her arms and breast several times. L.J. reported this conduct to the school administration.

The second victim, S.W., testified that defendant sat next to her in an acting class. In May 2001, defendant placed his hand on her thigh and moved it upward to her groin area on several occasions. Once, defendant pushed his hand between her legs and rubbed her thighs. A few times, defendant also poked or grabbed at S.W.'s breasts. S.W. told defendant to stop when he engaged in this conduct. Sometimes defendant complied but, at other times, he continued his conduct despite S.W.'s objections.

In addition to the victims, the prosecutor called J.D. as a witness pursuant to MRE 404(b). J.D. testified that she was in defendant's chemistry class in the first semester of the 2000-2001 school year. On the first or second day of school, defendant leaned over, placed his

hand on her upper thigh, and tucked his fingers in the crease between her legs, which were crossed. J.D. reprimanded defendant and pulled his hand away from her body. Defendant repeated his actions a second time with more force and touched J.D.'s vagina when his hand was between her legs. Defendant also made a comment of a sexual nature to J.D. A couple of days after the incident, defendant asked J.D. to have "sex" with him, and J.D. responded with a "firm no." Defendant nevertheless placed his hand on her inner thigh, J.D. moved his hand, but defendant repeated his attempt to touch her. J.D. also testified that she saw defendant touch S.W. inappropriately in the chemistry laboratory. According to J.D., defendant approached S.W. from behind, placed his hands on her upper thighs near her groin, and thrust his pelvis at her. J.D. recalled that, on another occasion, defendant poked at S.W.'s breasts.

II. Analysis

A. Other Acts Testimony: MRE 404(b)

Defendant argues that the trial court erred by admitting J.D.'s testimony under MRE 404(b). We review this preserved evidentiary issue for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). If error is found, reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). Relevant, "other acts" evidence does not violate MRE 404(b) unless it is offered only to show the criminal propensity of an individual. *People v Katt*, 248 Mich App 282, 304; 639 NW2d 815 (2001). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be used to determine the admissibility of other bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. It must also demonstrate that the evidence is relevant. *Id.*

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material

fact at issue more probable or less probable than it would be without the evidence. [*Id.* (citation omitted).]

The prosecution filed its notice of intent to present the MRE 404(b) evidence before trial, and said that it planned to offer J.D.'s testimony to prove preparation, scheme, motive, lack of mistake, plan or system in doing the charged acts. These are proper purposes under MRE 404(b). Also, as noted by the trial court, the evidence was relevant to show intent, common plan and lack of fabrication.

With respect to common plan or scheme, the evidence of the charged conduct was sufficiently similar to the evidence of the uncharged conduct to support an inference that they were manifestations of a common plan, scheme or system. *Katt, supra* at 305, citing *People v Sabin (After Remand),* 463 Mich 43, 63; 614 NW2d 888 (2000). See also *Pesquera, supra* at 319. "[D]istinctive and unusual features are not required to establish the existence of a common plan or design." *People v Knox*, 256 Mich App 175, 192; 662 NW2d 482 (2003), citing *People v Hine,* 467 Mich 242; 650 NW2d 659 (2002). The charged and uncharged acts contained common features beyond mere commission of acts of impermissible sexual contact: like the victims, J.D. was a student at the same school as defendant; she was female; she was in a class with defendant; she was touched on her inner thighs by defendant; and she was ignored when she told defendant to stop his conduct. There is "such a concurrence of common features" between the charged and uncharged acts that the charged acts are "naturally to be explained as caused by a general plan of which they are individual manifestations." *Katt, supra* at 306. The fact that defendant engaged in a common plan or scheme of inappropriately touching female students despite their protestations supported the prosecutor's theory that the acts occurred and were not fabricated as suggested by the defense. *People v Knapp,* 244 Mich App 361, 380; 624 NW2d 227 (2001).

With respect to intent, the prosecutor was required to prove that defendant touched the two victims for sexual gratification, sexual arousal or for a sexual purpose. MCL 750.520e(1)(b); MCL 750.520a(n). The similar-acts evidence in this case supported an inference that defendant acted for a sexual purpose. J.D. testified that, when defendant first touched her and she protested, he made a sexual statement similar to "you know you like it." On another occasion, defendant asked J.D. to have "sex" with him. He then put his hand on her inner thigh. This evidence was logically relevant to prove that defendant acted with a sexual purpose when he later touched the two victims on the inner thighs and poked their breasts.[1]

We also agree with the trial court that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. The similar-acts

[1] Defendant further complains that it is improper to offer bad-acts evidence to prove motive. We agree that a prosecutor may not argue that a defendant is motivated out of sexual attraction. Such an argument is "undistinguishable from the so-called 'lustful disposition' rule," which has never been adopted by our courts. *Sabin, supra* at 68; *People v Watson,* 245 Mich App 572, 579-580; 629 NW2d 411 (2001). This observation, however, has no bearing on this case because defendant concedes that the prosecutor did not use the evidence to demonstrate motive.

evidence was presented in a straightforward manner with little extraneous information or detail. The evidence was not voluminous, and the prosecutor never argued that a conviction would be appropriate based on the uncharged conduct. In addition, nothing in the record supports a finding that there was a risk of confusion or a risk that the jury would be overwhelmed and unable to follow the clear limiting instruction given by the trial court with respect to the similar-acts evidence.

Defendant also alleges that the trial court admitted J.D.'s testimony without analysis and with inadequate information about the substance of the proposed testimony. Our review of the record reveals that the trial court formulated its decision within the framework of *VanderVliet, supra*. Furthermore, were we to accept defendant's claim, reversal is not required. We will not reverse where the trial court reached the correct result. *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

Defendant also challenges the admission of the victims' testimony about acts other than those that formed the basis of the charged offenses. While there are limits on the admissibility of MRE 404(b) evidence, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The victims' background testimony properly gave the full context to the jury in addition to establishing that the acts were part of a pattern of conduct and were not fabricated. More importantly, we note that the defense relied on the challenged testimony when arguing that defendant's conduct was not criminal and was, at most, obnoxious. Moreover, defendant never sought to limit or prohibit the challenged testimony.[2]

B. Unanimity Instruction

Defendant claims that the trial court erred by failing to give a proper unanimity instruction. Specifically, he argues that, because the charged and uncharged conduct was materially distinct and there were numerous different types of alleged criminal touching, a specific unanimity instruction was required. This issue is not preserved because defendant did not object to the general unanimity instruction that was given at trial, or request a specific unanimity instruction before the jury deliberated. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Therefore, we review this issue for plain error. *Id.*

[2] Defendant also refers to the testimony of another female student, Emily Schulkins, who was a witness for the prosecution. Schulkins testified that she saw defendant touch S.W. in an inappropriate manner during class. In response to defense counsel's questioning, Schulkins indicated that she witnessed the inappropriate touching hundreds of times. Defendant not only elicited this testimony and failed to object, but he used the testimony in his closing argument to assist in his defense. A defendant is not permitted to assign error on appeal to something his counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Further, we note that, while Schulkins' testimony was not offered under MRE 404(b), it would have been permissible under that rule. Like J.D.'s testimony, it was relevant to the issue of defendant's common plan or scheme.

In *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), the defendant was charged with one count of first-degree criminal sexual conduct. At trial, however, the victim testified about three different incidents that took place over a period of days in January 1989. *Id.* at 506-507. The trial court refused to give the specific unanimity instruction requested by the defendant. *Id.* at 508. The Supreme Court ruled that a specific unanimity instruction is required where alternative acts are presented to the jury and those acts are materially distinct, or where there is reason to believe that the jurors may be confused or disagree about the basis of the defendant's guilt. *Id.* at 524. Because there was a continued course of conduct involved and because neither party offered materially distinct proofs, the factual basis for a special unanimity instruction was not present. *Id.* at 528-529. The Court noted that the defense was to completely deny the charges; thus, the "sole task of the jury was to determine the credibility of the victim with respect to the pattern of alleged conduct." *Id.* at 528. "Absent any indication of juror confusion or disagreement over the existence of any of the alternative acts, a specific unanimity instruction is not required." *Id.* at 529.

Here, defendant was charged and convicted under MCL 750.520e(1)(b), which prohibits sexual contact when force or coercion is used to accomplish the sexual contact. Sexual contact is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . ." MCL 750.520a(n). Intimate parts are defined as the "primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(c). The trial court instructed the jury that the prosecutor had to prove that defendant intentionally touched the victims' genital areas, groins, inner thighs, buttocks or breasts or the clothing covering those areas.

We find that defendant's conduct in the time frame of April and May 2001, represented a continuous course of conduct, and we note that materially distinct proofs were not offered by either party. *Cooks*, *supra* at 528-529. The touching of the victims' breasts or inner thighs near the groin was sufficient to sustain the convictions. *Id.*; MCL 750.520e(1)(b); MCL 750.520a(c) and (n). Further, the defense in this case was that the incidents were fabricated, i.e., did not occur, and, if they did occur, they were not for a sexual purpose. The jury's role was to determine whether the victims were credible and whether the touchings were for a sexual purpose. In *People v VanDorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993), the Court stated:

> We find no manifest injustice in this case. The number or specific identification of acts of sexual penetration was not in dispute in this case. The defendant's position was simply that there was no sexual assault committed. It was obvious to the participants in the trial that the verdict turned on whether the jury believed the testimony of the complainant and Terry Doyle on the one hand, or found reasonable doubt that any sexual assault occurred, as claimed by the defendant. Given that posture of the case, there was no reason for the parties to focus on the specifics of individual penetrations. In this context, the failure to give an instruction requiring unanimity on a particular act in no way impeded the defense or denied the defendant a fair trial.

Given the defense in this case, the failure to give a specific unanimity instruction on a particular act did not impede the defense or deny defendant a fair trial. *Id; Cooks, supra.* Moreover, there

was no indication of juror confusion or disagreement over the incidents forming the basis of the convictions. *Id.* The use of a general unanimity instruction was not plain error.

C. Sufficiency of the Evidence

Defendant contends that the prosecutor presented insufficient evidence that the sexual contact was accomplished by force or coercion.[3] MCL 750.520e(1)(b) provides that a person is guilty of fourth-degree criminal sexual conduct if he engages in sexual contact with another person and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, situations in which "the actor overcomes the victim through the actual application of physical force or violence." MCL 750.520e(1)(b)(i).[4] In *People v Premo*, 213 Mich App 406, 408-409; 540 NW2d 715 (1995), the Court determined that, where the defendant pinched the victim's buttocks, the element of force was satisfied.

> The definition of the term "force" includes, among other things, "strength or power exerted upon an object." We believe that the act of pinching is an act of physical force because it requires a person to exert strength or power on another person. Accordingly, contrary to defendant's argument, the act of pinching is sufficient to constitute force under MCL 750.520e(1)(a). [*Id.* at 409 (citation omitted).]

The *Premo* Court distinguished *People v Berlin*, 202 Mich App 221; 507 NW2d 816 (1993), the only case on which defendant relies. *Premo, supra* at 409-410. In *Berlin*, the defendant merely took the victim's hand and placed it on his crotch. *Berlin, supra* at 222. The Court was not satisfied that the force or coercion requirement was met. *Id.* at 222-223. In *Premo*, the Court was troubled by the holding in *Berlin* and distinguished the conduct at issue by ruling that the "instant case involves [the] defendant actively pinching the victims." *Premo, supra.*

Here, L.J. testified that, on May 18, 2001, defendant grabbed her legs and sat her down in a chair. He actively poked at L.J.'s arms and breasts several times. On other occasions, defendant rubbed L.J.'s thighs or grabbed her bottom. S.W. testified that in early May 2001, defendant actively poked or grabbed at her breasts despite her protestations to stop, and he also touched her groin area multiple times. On one occasion, he "pushed his hand in between" her legs and rubbed her thighs. This testimony was sufficient to enable a rational jury to conclude

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[3] When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

[4] MCL 750.520e(1)(b)(v) provides that force or coercion may be found when the actor achieves the sexual contact through concealment or by the element of surprise. The jury in this case, however, was not instructed that it could find force or coercion on that basis.

that defendant actively applied force to both L.J. and S.W. in order to accomplish the sexual contact.[5]

Affirmed.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter

[5] Defendant also challenges the effectiveness of defense counsel. Defendant has abandoned this claim. Defendant fails to explain how his lawyer's conduct deprived him of a fair trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).